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IN THE

Supreme Court of the United States

October Term, 1966

No. 1061

WILLIAM MCADOO, VIVIAN ANDERSON, DAVID DOUGLAS, MICHAEL CRENOVICH, NATHANIEL BARNETT,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York, County of New York, First Department

RESPONDENT'S BRIEF IN OPPOSITION

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Preliminary Statement

This is a petition for a writ of certiorari to the Appellate Term of the Supreme Court of the State of New York, County of New York, First Department, to review a decision of that court, entered June 9, 1966, affirming, without opinion [51 Misc. 2d 263], a judgment of the Criminal Court of the City of New York, County of New York, convicting the petitioners after separate trials of the misdemeanor of CRIMINAL CONTEMPT [N. Y. Penal Law, §600(6)] (45 Misc.

2d 664). Each petitioner was sentenced to serve a term of four months' imprisonment.

On September 16, 1966, leave to appeal to the Court of Appeals of the State of New York was denied by Associate (now Chief) Judge STANLEY H. FULD. Judge FULD noted that:

> "it was argued that their convictions violated their rights under Article III and under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution in that (1) they were not proceeded against by way of an indictment but by an information filed by the District Attorney which necessarily resulted in their being deprived of their rights to a trial by jury; (2) when before the Grand Jury, they were not advised of the purpose of its investigation or of the pertinency of the questions which they refused to answer to the topic under investigation; (3) they were compelled to testify before the Grand Jury in violation of their rights against self incrimination and without any effective grant of immunity from prosecution and without being fully and fairly advised of their rights before that body; (4) the area under investigation by the Grand Jury had been preempted by the federal government; (5) immunity from prosecution could only have been granted by the Attorney General of the United States by virtue of the preemptive provisions of 18 U.S.C. §3486 and the purported grant of immunity by the Grand Jury was a nullity; and (6) the unbridled discretion residing with the District Attorney to proceed against these appellants for criminal contempt as a misdemeanor or by way of a contempt proceeding under §750 of the Judiciary Law for the identical offense and with disproportionately severe consequences deprived them of the equal protection of the laws."

In the instant petition, petitioners renew these claims, and also assert that they were not fully and fairly advised of their rights before the grand jury, and that the prosecutor multiplied contempt counts by repeated questions on the same subject which they had previously refused to answer.

An enlargement of time to file the petition was granted by Mr. Justice HARLAN (petition, p. 41).

Introduction

In August of 1964, a New York County grand jury commenced an investigation into the riots which had taken place a month earlier in the Harlem area of the city, precipitated by the shooting of a Negro youth by an off-duty police officer. Specifically, as the prosecutor who conducted the investigation explained in the grand jury, the grand jury assembled "to determine whether the Progressive Labor Movement and its membership [had] conspired to commit the crimes of incitement to riot, and conspiracy to commit criminal anarchy" (501).* The several petitioners herein were each immunized against prosecution [N. Y. Penal L. §§584, 2447] and individually asked questions concerning the topic of the investigation. To a greater or lesser degree they responded to the prosecutor's inquiry; however, each witness balked at some stage of the proceeding and failed to answer one or more of the questions propounded. They were warned of the consequences of the course they had chosen to adopt—their persistence in refusing to answer the questions resulted in the grand jury voting to inform against them.

* References are to the typewritten record on appeal.

Trial on the contempt informations was held in the Criminal Court of the City of New York before a panel of three judges. Each defendant was tried separately; decision was reserved until all trials had concluded. On March 22, 1965, by a unanimous court, petitioner McAdoo was found guilty of three counts of Criminal Contempt for refusing to answer the following questions:

> "Mr. McAdoo, during the July riots in New York County, were you present at the offices of the Progessive Labor Movement, on Lenox Avenue, and did you at that time demonstrate how a Molotov cocktail is made?" (271).
>
> "Mr. McAdoo, I show you Grand Jury Exhibit No. 15, which is a leaflet which says:
>
> Harlem Freedom Fighters
>
> How to make a Molotov cocktail.
>
> I ask you whether you have ever seen that document before?" (274).
>
> "During the July riots in New York County did you and William Epton agree to incite further riot?" (275).

Petitioner Anderson was also found guilty of the same crime in that she had declined to reply to the following questions:

> "Did you and William Epton agree to incite further riots in New York County in January of this year?" (372).
>
> "Were you present in the office of the Progressive Labor Movement in July of this year with William Epton and discussed with him and another individual the possession of forty Molotov cocktails?" (374).
>
> "Did you hear William Epton discuss the purchase of firearms for use at the Progessive Labor Movement?" (375).

Petitioner Douglas was found guilty for failing to answer these questions:

> "Mr. Douglas, did you agree and conspire with William Epton to incite further riotings in New York County during July of this year?" (573).
>
> "Subsequent to your appearance here, have you discussed your testimony with other members of the Progressive Labor Movement, namely, William Epton, William Anderson, Abraham Hart, Harold Young?" (578-9).

Similarly, petitioner Crenovich was convicted for not replying to the following:

> "Are you a member of the Progessive Labor Movement?" (657-8).
>
> "Who else do you know at the Harlem Defense Council?" (677).

Lastly, Nathaniel Barnett's failure to respond to either of these queries resulted in his being convicted of the same crime:

> "Were you associated with Tri-line Offset Company Incorporated?" (727).
>
> "Mr. Barnett, where were you during the riots here in New York City in July of this year?" (727).

POINT I

The investigation by the grand jury of conspiracy to incite a riot (N. Y. Penal Law, §§2090, 2091) was not pre-empted by the Smith Act, the federal sedition statute [answering petitioners' Points 3 and 3a, pp. 12-14].

Petitioners assert that the grand jury was investigating the crime of criminal anarchy (N. Y. Penal Law, §160), a statute which, they contend, has been pre-empted by the enactment of the Smith Act (18 U.S.C. 2385), and that consequently, the State was precluded from delving into any violations of this federal law. As a corollary, they also claim that the State could not confer a valid immunity upon them, that right being reserved to the Attorney General of the United States, and hence, petitioners were fully justified in asserting their Fifth Amendment privilege.

But the premise upon which their argument rests—that the grand jury was investigating only the crime of criminal anarchy—is fundamentally incorrect. For the jury had undertaken to determine whether any violation of either the criminal anarchy statute or the statute prohibiting riot or incitement to riot [N. Y. Penal Law, §§2090, 2091] had been committed (501). In fact, the information upon which each petitioner was tried and convicted does not mention criminal anarchy, but plainly states that the grand jury was conducting "an investigation to determine whether violations of the Penal Law relating to conspiracy to incite a riot had occurred." Petitioners do not claim that this provision of the New York Penal Law (§§2090, 2091) has been supplanted by federal legislation, an argument

which would be difficult to espouse in any event, as the power to quell riots seems well within the police powers reserved to the States by the Federal Constitution. Instead, petitioners focus their attention on a statute which is not really in issue here—the criminal anarchy law.

But even their unwarranted attack upon that statute is incorrect on the grounds they maintain. Petitioners urge that the Smith Act (18 U. S. C. 2385) has effectively superseded and thus invalidated the provisions of the New York criminal anarchy statute, and cite as authority for the proposition this Court's decision in *Pennsylvania* v. *Nelson* [350 U. S. 497 (1956)]. Their analysis of the Court's holding in that case is inaccurate, for the decision in *Nelson* specifically held that state anti-sedition laws are superseded only insofar as they outlaw sedition against the federal government (*id.* at 499). And the Court took pains to point out (*id.* at 499) that the Supreme Court of Pennsylvania had found that there was no evidence whatever that Nelson uttered "a single word indicating a seditious act * * * directed against the Government of Pennsylvania" [*Commonwealth* v. *Nelson,* 377 Pa. 58 (1954)].

The limited extent of the federal pre-emption doctrine in the area of anti-sedition legislation was further emphasized in *Uphaus* v. *Wyman* [360 U. S. 72 (1959)]. Discussing the *Nelson* decision, the Court stated:

> "* * * The opinion made clear that a State could proceed with prosecutions for sedition against the State itself. * * * Nor did our opinion in *Nelson* hold that the Smith Act had proscribed state activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.' In foot-

note 8 of the opinion it is pointed out that the States had full power to deal with internal civil disturbances'' (*id.* at 76-77).

Thus, New York's anarchy statute remains valid to the extent that it is directed to sedition against the State and localities within the State, a distinction with particular pertinence to this case, for, from the questions posed, it is clear that the inquiry was designed to determine whether petitioners and their associates were engendering further violence at a time when chaotic conditions reigned in the streets of New York City.

POINT II

The grant of immunity was in accordance with the procedures set forth in Section 2447 of the New York Penal Law; accordingly, the petitioners, having received full statutory immunity, were required to testify [answering petitioners' Point 2, pp. 10-12].

Petitioners have examined the procedures whereby immunity was conferred upon each of them and profess to find error there. In each case, the record clearly shows, the grand jury was duly asked to vote on whether to grant the witness immunity prior to his actual appearance before that body. After he or she appeared and refused to testify on grounds of privilege, the witness was informed of the jury's decision and the foreman, at the request of the assistant district attorney, then directed the witness to respond. Petitioners assert that the state statute mandates that the vote to confer immunity must follow the witness' refusal, and that hence, the grant of immunity was

defective. But they fail to demonstrate a federal question, particularly since they make no claim that they were in doubt, at the time they failed to testify, whether immunity had been effectively conferred [compare *Stevens* v. *Marks*, 383 U. S. 324 (1966)].

Moreover, petitioners' view of state law is incorrect. The pertinent statute (Section 2447 of the New York Penal Law) only ordains that the order by the competent authority (*e.g.*, the grand jury at the request of the district attorney) follow the refusal; it does not specify when the vote is to take place. In *People* v. *Laino* [10 N.Y.2d 161, 172 (1961)], the New York Court of Appeals summarized the immunizing process under Section 2447. To achieve its benefits a witness must:

> "(1) *affirmatively claim* his privilege against self-incrimination, (2) be directed or ordered to answer by competent authority, for instance, a Grand Jury at the request of the prosecutor, and (3) testify (*People* v. *DeFeo*, 3 N.Y.2d 595, 602-604, *supra*)" (emphasis in text).

This classic formulation was recently reiterated by this Court in *Stevens* v. *Marks* [383 U. S. 234, 242 (1966)]. Neither the Court's discussion of the New York statute, nor the statute itself, indicates the time at which the jury must vote to confer immunity.

In any event, as is noted above, the issue seems to be directed at the details of New York statutory procedure, and no federal question is raised thereby.

POINT III

The questions posed were relevant to the grand jury's investigation [answering petitioners' Point 1, pp. 7-10].

Petitioners contend that the failure of the assistant district attorney to notify them of the purpose of the inquiry and the materiality of each question to the investigation must vitiate the several contempt convictions. While agreeing that a witness before a grand jury, even under a grant of immunity, may refuse to reply to all but relevant questions, we submit that that principle has no application to the case at bar. For, except for petitioner Crenovich, none of the defendants questioned the pertinency of the questions to the purposes of the investigation, either in the grand jury or at trial. Nor, for that matter, do they contend in their petition to this Court that the questions were irrelevant. And surely, there is no abstract requirement that an interrogator explain the relevance of each and every question in the absence of a challenge to the question's materiality. Far from claiming irrelevancy, petitioners frivolously sought to interpose their Fifth Amendment privilege as ground for refusing to cooperate with the investigation. However, that privilege, as the prosecutor explained again and again, had vanished with the grant of immunity; and he further warned them that by persisting in a warrantless refusal to answer they each ran the risk of a contempt prosecution. Their failure to heed his advice resulted, of course, in the instant prosecutions.

In any event, both Douglas (501)—who frivolously claimed "harassment" (572)—and McAdoo (337-8) were

expressly notified of the subject of the grand jury's investigation. The assistant district attorney explained that the jury was inquiring "to determine whether the Progressive Labor Movement and its membership had conspired to commit the crimes of incitement to riot, and conspiracy to commit criminal anarchy". Prominent among the questions each witness failed to answer after being so informed were the following:

> "Mr. McAdoo, during the July riots in New York County, were you present at the offices of the Progressive Labor Movement, on Lenox Avenue, and did you at that time demonstrate how a Molotov cocktail is made?" (271).
>
> "Mr. Douglas, did you agree and conspire with William Epton to incite further riotings in New York County during July of this year?" (573).

The assertion that the prosecutor had to detail the pertinence of questions such as these to the hitherto disclosed subject of the investigation is little more than ludicrous.

Similarly, although neither petitioner Anderson nor Barnett was expressly informed of the subject of the grand jury's inquiry, the purpose of the investigation and the question's materiality to that purpose is self-evident on the face of the questions which they refused to answer. Moreover, petitioner Anderson had testified at length about the role the Progressive Labor Movement had played in both instigating and encouraging the continuance of the riots and had fully described her own part in that endeavor (390-427). Her sudden refusal to continue testifying along these lines cannot possibly be justified in terms of not comprehending the purpose or materiality of the interrogation; and, as was noted above, neither Anderson nor any other

of the petitioners asserted irrelevancy as a ground for refusing to reply to the questions.

Petitioners, of course, even in the absence of an objection on the ground of immateriality, could not validly be convicted for contempt unless the questions were in fact relevant to a clearly defined inquiry. Here, unlike the situation which existed in the cases of *Russell* (*Price*) v. *United States* [369 U. S. 749, 767 (1962)] and *Deutch* v. *United States* [367 U. S. 456 (1961)], the subject matter of the inquiry could be easily ascertained and the relevancy of the questions thereto easily determined. In *Russell* (*supra*) this Court reversed the judgment of conviction because the indictment failed to specify the subject under investigation at the time of the congressional sub-committee's investigation of the defendant. Nor could that subject be ascertained with any degree of certainty either on trial or appeal [369 U. S. at 767-8]. In *Deutch,* the subject under investigation was again obscure, and further, as an interrelated problem, the government had failed at trial to prove the pertinence of the questions to the purposes of the inquiry. In contrast, the trial court here held that the questions were germane to the subject of the grand jury inquiry [*People* v. *McAdoo,* 45 Misc. 2d 664, 668 (1965)], and further, the crime under investigation was clearly set forth on the face of the informations upon which the petitioners were each tried and convicted.

As noted above, petitioner Crenovich alone challenged the questions' pertinency, both in the grand jury and at trial. Crenovich refused to disclose whether he was a member of the Progressive Labor Movement (657), or to

reveal the names of other members, besides William Epton, of the Harlem Defense Council (677). Initially, it is important to note that Crenovich makes no claim in his petition that the broaching of these questions violated or otherwise tended to stifle any First Amendment rights [*cf. N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1958)]. But even were such an assertion made, it is evident from what the investigation had revealed concerning the activities of the Progressive Labor Movement and the Harlem Defense Council during the riots that the State had "demonstrated an interest in obtaining the disclosures * * * sufficient to justify the deterrent effect * * * these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association" [*N. A. A. C. P.* v. *Alabama, supra* at 463].

Crenovich's questioning revealed that during the outbreak in Harlem his printing firm had issued several thousand copies of a bulletin entitled "Wanted for murder, Lieutenant Thomas Gilligan". These posters had been ordered by William Epton of the Harlem Defense Council (662). Whether the witness was himself a member of the conspiracy to cause riot, and further, the identity of other members of the unlawful combination was clearly within the ambit of the grand jury's investigation. In light of these questions, as well as the many others which were put to him concerning the subject of the riots (which had taken place but a short time previously), it is absurd for him to claim that he was in doubt as to the nature of the inquiry. On the other hand, it can fairly be said of Crenovich's testimony that he sought at every turn to frustrate and obstruct the investigation (see, *e.g.*, pp. 672-678) by re-

peatedly asserting that he could not recall events that had taken place only a short while before, and claiming the protection of the Fifth Amendment even when it had been patiently explained that its protections had been replaced by a grant of immunity. In short, the assertion that he was unaware of the purpose of the jury's inquiry was but another weapon in his arsenal to interfere with the investigation, and was properly disregarded by the New York courts.

POINT IV

Petitioners received adequate notice that immunity had been conferred; moreover, in most instances the issue has not been preserved for review [answering petitioners' Point 4, pp. 14-16].

The five petitioners claim that they were inadequately apprised of the existence of immunity from prosecution at the time of their refusals to answer. None of the petitioners claimed this in the grand jury. As to petitioners McAdoo, Anderson and Douglas, the claim is inappropriately raised here, for it was not raised in their pre-trial motions to dismiss the informations, or at trial (284-341, 449-74, 584-99), or on appeal to the Appellate Term. While these petitioners suddenly raised the claim before Judge FULD on application for leave to appeal to the Court of Appeals, the denial of leave to appeal may hardly be considered review on the merits by the entire court, or even by Judge FULD, in view of the failure to present the claim earlier; in any case, the writ of certiorari sought is one addressed to the Appellate Term, where the contention of lack of notice was not raised by these three petitioners.

Petitioner Barnett, by contrast, made such a claim in a pre-trial motion, at trial (738-9) and on the state appeal; however, in view of the absence of an opinion by the Appellate Term, or of an amendment of the remittitur—none having been sought—it is impossible to conclude with assurance that the claim was reviewed on Barnett's appeal. Similarly, as to petitioner Crenovich, no such claim was raised at trial (686-702), but petitioner raised the issue in a pre-trial motion and on appeal to the Appellate Term; again, however, the Appellate Term order does not state whether the issue was reviewed.

Against this background of unequivocal failure to preserve the question (petitioners McAdoo, Anderson and Douglas) and some ambiguity in the record as to its survival here (petitioners Barnett and Crenovich), we turn to the claim on the merits. Here the record is clear: all of the petitioners were adequately informed that they had complete immunity from prosecution when they refused to answer the questions.

Each petitioner, upon being brought before the grand jury, was instructed by the assistant district attorney that the jury had voted beforehand to confer immunity upon him, and that the immunity extended to protect him from any future prosecution for any crime which his testimony might reveal (McAdoo, 270-1; Anderson, 369-74; Douglas, 501-5; Crenovich, 625-6, 652, 657-8; Barnett, 725-8). This is, of course, an entirely satisfactory, if somewhat simplified, explanation of the safeguards embodied in the New York statute (Penal Law, §2447); thus it is difficult to comprehend the thrust of petitioners' argument that they were

not fairly advised of their rights. Particularly inasmuch as no question was, or is, raised as to the scope of the protection bestowed [compare *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964)], or whether these protections applied to petitioners [see *Stevens* v. *Marks*, 383 U. S. 242 (1966)] That the prosecutor did not launch, as petitioners apparently feel he should have, into a detailed, complex explanation of the subtleties of the immunity statute, such as would satisfy one skilled in law, but rather explained its import in layman's terms, unquestionably benefited rather than harmed petitioners. Furthermore, petitioners were represented by counsel when they testified, their attorneys waiting right outside the grand jury room. They often requested and were given opportunity to consult with their attorneys (see, *e.g.*, record pp. 248, 251, 257).

It is further claimed that petitioner Crenovich could have been misled by the assistant district attorney's asking him, after immunity had been conferred, whether he was asserting the privilege in good faith (675). The record makes clear, however, that the prosecutor was simply incredulous that Crenovich would assert the privilege after having been given the following explanation, a short time before, which clearly indicated that he could no longer claim its protection:

> "Q. Mr. Crenovich, before you appeared here, last week, this grand jury voted to grant you immunity from prosecution from—for any crimes which your testimony discloses. I explained that to you then. Do you understand that?
>
> "A. Yes.

"Q. Your privilege against self-incrimination evaporates when the Foreman of this Grand Jury directs you to answer the question (652)".

Petitioners McAdoo, Anderson and Douglas, who testified on more than one occasion, claim that the explanation of their status on the first day was insufficient to apprise them that they had immunity thereafter, when they refused to answer on a later date. However, the record plainly reflects that both McAdoo and Anderson were advised of the conferral of immunity on the very day they refused to testify, and thus must have known that they were merely witnesses and not parties defendant (270-1, 370-2). As to petitioner Douglas, he appeared on three occasions before the grand jury—on two of those occasions he was painstakingly reminded of his role as a witness in the investigation (502, 565). Viewed with this background in mind his present claim that he had not been properly advised is preposterous.

POINT V

The failure to accord petitioners a jury trial presents no federal question [answering petitioners' Point 5, pp. 16-18].

Petitioners contend that certain provisions of the New York Constitution and Laws which provide for a non-jury trial in the cases of certain minor offenses, such as criminal contempt of court, are unconstitutional in that they deprive them of their right to a trial by jury. However, the guarantee contained in the Sixth Amendment to a trial by jury has never been held to be incorporated into the Fourteenth

Amendment, but operates only in restraint of Federal power, and has no application to the States [see *Malloy* v. *Hogan,* 378 U. S. 1, 4, fn. 2 (1964); *Maxwell* v. *Dow,* 176 U. S. 581, 596-7 (1900); *Hurtado* v. *California,* 110 U. S. 516 (1884)]. Moreover, this Court has consistently recognized that even under the Sixth Amendment there exists no right to a trial by jury in cases involving petty offenses [*United States* v. *Barnett,* 376 U. S. 681 (1964); *District of Columbia* v. *Colts,* 282 U. S. 63 (1930); *Schick* v. *United States,* 195 U. S. 65 (1904); *Lawton* v. *Steele,* 152 U. S. 133 (1894); *Natal* v. *Louisiana,* 139 U. S. 621 (1891)]. This exception has been engrafted onto the federal statutes governing criminal procedure [see 18 U.S.C. 1 (1964 ed.)] which define a petty offense as one which cannot be punished by more than six months' imprisonment; and just recently this Court has held that this statute permits a prosecution for criminal contempt for refusing to testify before a grand jury to be conducted by a court without a jury, providing, however, that the penalty imposed does not exceed six months [*Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966)]. In this respect, we note that none of the sentences imposed here exceeded four months.

POINT VI

The failure of the prosecution to initiate contempt proceedings against petitioners pursuant to Section 750 of the Judiciary Law of the State of New York did not deprive them of equal protection of the laws [answering petitioners' Point 5, pp. 18-19].

The New York statutes contemplate two methods for dealing with a recalcitrant witness before a grand jury: the first is to proceed by way of indictment or information pursuant to Section 600 of the Penal Law, which subjects an offender to a jail term of one year and the imposition of a $500.00 fine; the second is a proceeding whereby the witness is brought before a Justice of the Supreme Court and directed to respond—his failure to obey is deemed an act of *lèse majesté* and is summarily punishable, under the provisions of Section 750 of the Judiciary Law, by imprisonment for a term of thirty days and/or a fine of $250.00. Since the prosecutor can freely avail himself of either procedure, appellant urges that the disparity in sentences affords some contemnors greater protection of the laws than others. However, the "protection" gained under Section 750 is illusory, for Section 601 of the Penal Law states:

> "A criminal act is not the less punishable a crime, because it is also declared to be punishable as a contempt of court."

Section 602 provides further:

> "Punishment for a contempt, as prescribed in article nineteen of the judiciary law, does not bar an indictment [under Section 600] for the same offense; but where a person who has been so punished is convicted

on such an indictment, the court, in sentencing him, must take into consideration the previous punishment."

The prosecutor may or may not take advantage of the above provisions, and proceed against a particular witness to the full extent of the law. His failure to do so, on the other hand, does not deprive others similarly situated of the equal protection:

> "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged. *Oregon* v. *Hicks, supra;* cf. *Snowdon* v. *Hughes,* 321 U. S. 1 (1944); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886) (by implication)" [*Oyler* v. *Boles,* 368 U. S. 448, 456 (1962)].

POINT VII

The prosecutor did not unlawfully and vindictively multiply contempt counts by continued questioning of an unwilling witness [answering petitioners' Point 6, p. 19].

Petitioners contend that the assistant district attorney unlawfully built up contempt counts by continuing his inquiry when it became apparent that each petitioner intended to rely on his Fifth Amendment privilege. Throughout the investigation, however, it was never clear as to which questions the witnesses would assert their privilege.

For example, petitioner Crenovich testified freely for an extended period of time before refusing to reply to the prosecutor's question (630-52). When, eventually, he did indicate an unwillingness to respond, the prosecutor reminded him of the grant of immunity, whereupon he supplied the information requested (652-3). It was only much later that the witness adamantly refused to cooperate with the investigation, which resulted in one of the contempt citations (657). The record indicates that Crenovich continued his testimony until, at page 677, he again refused to respond, which formed the basis for the second contempt count. But even after this had occurred, Crenovich testified regarding certain matters. It can fairly be said, though, that his pattern of refusal or willingness to testify was arbitrary and could not be predicted with any degree of certainty, for sometimes he would comply with a direction by the foreman of the jury (668), and on other occasions he would refuse to do so (665, 676, 685). The other petitioners were similarly capricious in their choice of questions to which they would reply, except for petitioner Barnett, and his interrogation ceased after he refused to respond to the first two queries.

In any event, the question is academic, as petitioners received concurrent sentences on the multiple counts.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1967